

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Service Rules for the 698-746, 747-762 and)	WT Docket No. 06-150
777-792 MHz Bands)	
)	
Implementing a Nationwide, Broadband,)	PS Docket No. 06-229
Interoperable Public Safety Network in the 700)	
MHz Band)	
)	
Amendment of Part 90 of the Commission's)	WP Docket No. 07-100
Rules)	

REPLY COMMENTS OF THE UTILITIES TELECOM COUNCIL

The Utilities Telecom Council (UTC) hereby files these reply comments in response to the FCC's *Fourth Further Notice of Proposed Rulemaking* in the above-referenced proceeding.¹ Comments on the record support allowing utilities and critical infrastructure industries (CII) to access the 700 MHz public safety spectrum. They recognize that there are numerous benefits to allowing such use, including interoperability with other public safety entities, as well as cost sharing of the network build-out and operation. None of the comments oppose allowing utilities and CII to access the spectrum. As such, the comments generally agree that utilities and CII should be able to share the 700 MHz public safety spectrum with public safety entities.

Moreover, such access is consistent with Section 337(f) of the Communications Act because the sole or principal purpose of utility and CII communications is to protect the safety of

¹ Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, ; Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, WT Docket No. 06-150; PS Docket No. 06-229, 26 FCC Rcd. 733 (2011)(hereinafter *Fourth Further Notice*).

life, health or property; utilities and CII are government or authorized non-governmental organizations; and their communications are not made commercially available to the public.² As more fully described below, the Commission has broad discretion to allocate the 700 MHz public safety spectrum, and nothing in the statute excludes utilities and CII. Therefore, the Commission should promote 700 MHz public safety/public service partnerships consistent with Congressional intent and Commission precedent, by adopting an inclusive interpretation of Section 337(f) that bases eligibility upon the sole or principal purpose of the communications services that are provided, not just the entities that provide them.

I. COMMENTS ON THE RECORD SUPPORT ALLOWING UTILITIES AND CII TO ACCESS THE 700 MHZ PUBLIC SAFETY SPECTRUM.

a. Comments recognize the public safety role of utility and CII communications services during emergencies and day-to-day operations.

Comments from numerous public safety organizations agree that utilities and CII do serve a valuable public safety purpose, particularly during emergency response. As the City of Seattle stated, “utility departments have a primary purpose of providing electricity, water and gas, and removing wastewater and solid waste from the properties in a city or county. Each of these utilities is vital to the safety of both lives and property. Fouled water, failure to remove wastewater, lack of electricity can each result in immediate damage to lives and property.”³ Moreover, “during a public safety incident, public utilities and other non-governmental entities that provide critical infrastructure are likely to play a vital role in supporting the efforts of emergency responders.”⁴

² 47 U.S.C. §337(f).

³ Comments of the City of Seattle at 1-2 (Apr. 11, 2011).

⁴ Comments of Deloitte at 15 (Apr. 11, 2011)(adding that, “the Commission should consider establishing a framework that accounts for the role of these critical infrastructure industries and their potential to promote additional spectrum efficiencies.”).

Utilities provided additional details in their comments about their public safety role during emergencies. Cleco stated that “[l]ike every other electric utility throughout the U.S., [Cleco’s] . . . crews stand side-by-side with police and fire crews in the protection of life and property during times of emergency, and in Louisiana’s case, natural disasters from hurricanes and the occasional ice storm. In emergency situations, those are the only two groups working to restore order – utilities and public safety personnel – no one else.”⁵ During emergencies, Cleco’s two-way radio systems are used for both “restoration of electric service, which feeds hospitals, public safety facilities, traffic systems, and water systems;” and for “coordination of traffic control, emergency service personnel, crime control and prevention, and general civil order.” Cleco explained that it also provides tower space to sheriff’s offices and fire departments in Louisiana, and that “public safety needs most closely match those of the utility’s, so primary and backup power to the sites are critical to both groups, as are the backhaul links that tie multi-site networks together.” Finally, Cleco commented that it “assigns personnel to parish EOCs to help coordinate emergency response efforts, and direct links to 911 centers are established to ensure Cleco responds immediately and appropriately to life threatening situations.”⁶

Even during routine operations, wireless communications systems are indispensable for utilities and CII to carry out their core missions safely and efficiently. As SCANA explained in its comments, “utility employees need to engage in instantaneous, uninterrupted communications with each other and with SCANA’s headquarters to ensure that work is carried out promptly, safely, and efficiently.”⁷ Utilities need effective and reliable radio communications in light of the field crews’ frequent work with high voltage electrical wires, natural gas lines, and other potentially hazardous features of the operational infrastructure. In addition to protecting the

⁵ Comments of Cleco at 2 (Apr. 11, 2011).

⁶ *Id.*

⁷ Comments of SCANA Corporation at 11 (Apr. 11, 2011).

safety of their crews, these radio systems protect the general public because utilities such as SCANA “suppl[y] the core resources – natural gas and electricity – that permit modern society to function,” providing essential services not only to industrial, business, and domestic operations but also to critical facilities, including hospitals and other emergency care providers that employ life support systems and emergency response equipment.⁸ As SCANA stated, “wireless communications are essential to enable SCANA to keep its systems functioning on a 24-hour-a-day, 7-day-a-week, 365-day-a-year basis to avoid power outages (and to quickly restore services in the event of an outage) that could deprive large areas and populations of electricity and natural gas services.”⁹ Thus, utilities should be able to share access to the 700 MHz Public Safety broadband spectrum for emergency response and restoration efforts and day-to-day operations that are essential to their internal operations.¹⁰

b. Comments agree that sharing public safety spectrum with utilities and CII would promote other public policy goals, including interoperability and deployment of broadband public safety networks.

In addition, comments by public safety organizations recognized that sharing public safety spectrum with utilities and CII would promote other public policy goals, including interoperability and cost-efficient deployment of broadband public safety networks. APCO agreed with other public safety organizations that “utilities and similar entities can play a critical role in emergency response activities,” and it stated that “[p]ublic safety interoperability with

⁸ *Id.*

⁹ *Id.* at 12.

¹⁰ *See also* Comments of Bruce B. Blais, Radio System Administrator Nevada Shared Radio System c/o NV Energy at 7-8 (Apr. 11, 2011)(describing how NV Energy currently shares 800 MHz spectrum with public safety and stating “if a public-private partnership were permitted, the State of Nevada would be able to deploy a more extensive broadband system quicker than if all these facilities had to be duplicated. Bringing public safety systems to more of the population faster is in the public interest, and partnerships with other public and private infrastructure providers should not only be permitted, but encouraged.”)

such entities is essential.”¹¹ Furthermore, public safety comments generally agree that utilities and CII can make it economically feasible to deploy 700 MHz public safety broadband networks, particularly in rural areas. For example, the City of Mesa explained that “building, operating and maintaining a 700MHz LTE broadband network exclusively for ‘first responders’ as Section 337 current interpretation stands, would be far beyond the financial justification and capabilities of most jurisdictions even with grant support.” However, “[t]he same business models also suggest that by permitting other public service users, such as electric, water and gas utilities, and other municipal agencies who also respond to emergency situations throughout the nation, will make such a private network economically feasible.”¹² These comments underscore the public policy considerations in favor of allowing utilities to access the 700 MHz public safety spectrum.

Utilities and CII already share spectrum with public safety in other bands, and the Commission should allow sharing the 700 MHz public safety spectrum to expand on the success of those systems. For example SCANA reported in its comments that it shares a statewide 800 MHz system with the State of South Carolina, through its Division of State Information Technology (“SCDSIT”).¹³ In the aftermath of Hurricane Hugo in 1989 and several other catastrophes, SCANA worked to implement a statewide, interoperable network; and SCDSIT and SCANA agreed to share costs and infrastructure assets and to jointly work together to solicit local governments to partner in the system.¹⁴ SCDSIT and SCANA share spectrum under a blanket waiver granted by the FCC in 1997, and today this cost-shared, public safety-private partnership has grown to over 381 agencies, representing federal, state and local governments,

¹¹ Comments of the Association of Public Safety Communications Officials-International, Inc. (APCO) at 9 (Apr. 11, 2011)(adding that “public safety network operators should be allowed to permit utility use of the network to the maximum extent permitted by law, and assuming the network has sufficient capacity.”)

¹² Comments of the City of Mesa at 9 (Apr. 11, 2011).

¹³ Comment of SCANA Corporation at 15 (Apr. 11, 2011).

¹⁴ *Id.*

law enforcement, fire services, emergency medical services, school districts, other public safety agencies, and utilities in South Carolina, North Carolina and Georgia.¹⁵ “However, because the FCC does not currently allow utilities to have shared access to the 700 MHz Public Safety broadband spectrum, SCANA’s ability to expand and migrate the shared system to the next generation is extremely limited.”¹⁶

II. ACCESS TO 700 MHZ PUBLIC SAFETY SPECTRUM FOR UTILITY AND CII COMMUNICATIONS IS CONSISTENT WITH SECTION 337(f).

a. Congressional intent and Commission precedent support providing access to public safety spectrum for utility and CII communications.

The Commission should promote the development of 700 MHz public safety/public service shared systems, consistent with Congress’s intent when it passed the 1997 Balanced Budget Act amendments to the Communications Act, including Section 337(f). Section 309(j)(2) shows that Congress intended to allocate spectrum for utilities and other CII that provide public safety radio services. While Congress explained that the scope of Section 309(j)(2) is broader than the scope of Section 337(f), that does not necessarily mean that the scope of Section 337(f) does not include utilities and CII.¹⁷ Moreover, as Southern and SCANA explained in their comments, the Commission may implement Section 337(f) based upon its implementation of Section 309(j)(2), so that *services* whose principal purpose is to protect the

¹⁵ *Id.* at 15-16, citing *State of South Carolina and SCANA Communications, Inc., Requests for Waiver of the Commission’s Rules*, Order, 13 FCC Rcd. 8787 (1997)(finding that grant of the waiver was justified because it 1) “would provide the public safety entities of South Carolina the ability to obtain wide-area coverage without incurring, in this time of limited government resources (especially for smaller, rural governmental entities), the expense of constructing an entire wide-area backbone system;” and 2) “would allow entities providing police, fire, medical, and other public safety services in South Carolina – large and small, state and local – to communicate with one another and with utility companies, both on a day-to-day basis and during emergencies.”)

¹⁶ *Id.* at ii.

¹⁷ See Comments of UTC at 33-34 (Apr. 11, 2011)(stating that “The terms of the two provisions (Section 337(f) and Section 309(j)) are remarkably similar, and taken together indicate that Congress intended to allocate auction-exempt spectrum – including the 700 MHz public safety spectrum -- for these classes of services.”

safety of life, health or property may access the spectrum.¹⁸ Thus, even if the Commission concludes that utilities and CII do not use the spectrum exclusively to protect the safety of life, health or property, it may still allow utilities and CII to use the spectrum if the principal or dominant use of the spectrum is for such purposes, consistent with Congressional intent to provide utilities and CII with access to spectrum and consistent with the “principal purpose” language of Section 337(f) and the Commission’s implementation of Section 309(j)(2).

b. The Commission has broad discretion to implement Section 337(f) so as to provide access for utility and CII communications, and it should not dictate the terms and conditions of access, including priority access.

The Commission has broad discretion to implement Section 337. Congress directed that the Commission *shall allocate* the 24 megahertz of spectrum for public safety services according to the terms and conditions established *by the Commission*.¹⁹ Nothing in Section 337 of the Act prohibits the use of the 700 MHz public safety broadband spectrum for utility and CII communications. Indeed, the Commission itself concluded that Section 337(a)(1) gives it “broad discretion” and “requires neither that the 24 megahertz at issue be allocated exclusively for public safety services nor that it be used only for such services.”²⁰ Therefore, the Commission may permit utilities and CII to use the 700 MHz public safety spectrum, subject to terms and conditions as determined by the Commission.

The Commission should provide maximum flexibility for utilities and CII to access the spectrum, consistent with many of the comments filed on the record.²¹ Specifically, the

¹⁸See Comments of Southern Company Services, Inc. at 17-18 (Apr. 11, 2011); and Comments of SCANA at 9 (Apr. 11, 2011).

¹⁹ 47 U.S.C. §337(a).

²⁰ *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, WT Docket No. 06-150, *Second Report and Order*, 22 FCC Rcd 15289, 15438-39 ¶419 (2007).

²¹See e.g. Comments of APCO at 9 (stating that “public safety interoperability with such entities [utilities and CII] is essential, and public safety network operators should be allowed to permit utility use of the network to the maximum extent permitted by law.”); Comments of City of Baton Rouge at 2 (stating that “[t]he Commission should support the network by providing maximum flexibility to operators.”). See also Comments of the Enterprise Wireless

Commission should refrain from dictating the terms and conditions under which utilities access the spectrum, including the terms and conditions of priority access.²² Instead, the Commission should allow utilities and public safety organizations to negotiate the terms and conditions for sharing spectrum. As UTC explained in its comments, the “sole or principal” language of the statute does not require priority access, and even if it could be so construed, the Commission should not dictate the level of priority for utility and CII communications because 1) LTE can provide multiple levels of priority access which makes a preemptible, priority access scenario remote; 2) the Commission should not engage in the arbitrary and potentially dangerous practice of determining priority access levels; and 3) mandating priority access for public safety entities would discourage utilities and CII from entering into partnerships with public safety to share the 700 MHz broadband network, thereby delaying or preventing the deployment of these networks in areas where utilities and CII could contribute needed resources.²³

c. The Commission should adopt a more inclusive interpretation of Section 337(f) that provides broader eligibility.

Similarly, the Commission should interpret Section 337(f) to allow broader eligibility. Under this more inclusive interpretation, utilities and CII should be eligible because they use communications for the sole or principal purpose to protect the safety of life, health or property; they are either government entities or non-governmental organizations that are authorized by

Association at 3 (Apr. 11, 2011)(stating that “state, county, and governmental entities are well-qualified to determine both whether the delivery of statutorily defined public safety services will be improved by allowing non-emergency responders to share the use of the Network and how to prioritize communications among all permitted users. Further, the Alliance believes that this flexibility should extend not only to all governmental use, but also to shared use with utilities and other CI entities whose assistance can be critical during emergency situations.”)

²² See e.g. Comments of UTC at 38.

²³ Comments of UTC at 39-40. See also Comments of Southern California Edison (Apr. 11, 2011)(concluding that secondary access to 700 MHz public safety spectrum would not be beneficial for utilities due to availability (i.e. priority access) and coverage issues.) These comments illustrate the real concerns that utilities and CII have about partnering with public safety to share the 700 MHz spectrum, underscoring the need to avoid imposing priority access requirements that may discourage utilities and CII from engaging in such partnerships.

government entities whose primary mission is the provision of public safety services; and they do not make their communications services commercially available to the public.²⁴ Similarly, under this more inclusive interpretation, other government entities should be eligible to share spectrum along with police, fire and rescue, which would meet the “sole or principal purpose” test, as well as the other requirements of Section 337(f).²⁵

This more inclusive interpretation of Section 337(f) is consistent with the plain language of the statute. The plain language provides that “the term ‘public safety services’ means services, the sole or principal purpose of which is protect the safety of life, health or property.”²⁶ Further, it provides that both government and authorized non-government organizations are eligible entities.²⁷ Finally, it prohibits the services from being made commercially available to the public.²⁸ As explained in UTC’s comments, the Commission must interpret Section 337(f) so as to give meaning to the term “services” and to read the provisions so that they are in harmony with each other. This interpretation would permit utilities and CII, as well as government entities other than police, fire and rescue, to use the 700 MHz public safety spectrum.

This more inclusive interpretation of Section 337(f) is also consistent with Congressional intent and Commission precedent. Congress intended to promote public safety/public service radio shared systems in the 700 MHz band.²⁹ In addition, the Commission originally adopted a

²⁴ See Comments of UTC at 6-25 (explaining in detail how utility and CII communications meet the three-part test under Section 337(f) as public safety services).

²⁵ See e.g. City of Charlotte Request for Declaratory Ruling, PS Docket No. 06-229 at ii-iii (Mar. 7, 2011)(seeking a FCC ruling “confirming that the City and other entities with broadband waivers are permitted to allow shared use of their 700 MHz broadband spectrum by governmental personnel including, but not limited to, those engaged directly in police, fire and medical emergency activities.”)

²⁶ 47 U.S.C. §337(f)(1)(A)(emphasis added).

²⁷ 47 U.S.C. §337(f)(1)(B).

²⁸ 47 U.S.C. §337(f)(1)(C).

²⁹ See *Congressional Record*, p. S6325 (June 25, 1997) (colloquy between Sen. Bryan and Sen. McCain during the Balanced Budget Act 1997 debate, showing that Congress did support shared systems to reduce costs and accelerate deployment.)

“more inclusive” interpretation of Section 337(f) and concluded that the “statute does not require licensees to have the sole or principal purpose of providing public safety services,” but instead “mandates that this spectrum must be used for *services* whose sole or principal purpose is to protect the safety of life, health or property.”³⁰ Under this more inclusive interpretation, utilities and CII communications could be considered public safety services, because “the nature of their day-to-day operations provides little or no margin for error and in emergencies they can take on an almost quasi-public safety function.”³¹

d. The Commission may also find that utilities and CII are eligible as first responders, or that utilities and CII may lease or share access with public safety entities.

If the Commission decides not to adopt a more inclusive interpretation of Section 337(f), it may still find that utilities and CII are eligible as “first responders”. As UTC explained in its comments, utilities and CII respond along with public safety to various natural and manmade emergencies, and there are various government programs and regulations that recognize the public safety role that utilities and CII serve during emergency response.³²

Alternatively, if the Commission does not find that utilities and CII are eligible as first responders, it should still allow them to share or lease the spectrum with public safety entities.

Sen. Bryan: I rise in support of the proposal to ensure that sufficient radio spectrum is made available for public safety and maintenance of the Nation's critical infrastructure, such as pipeline, railroad, and electric, gas and water utility services... I hope the FCC will promote the development of shared public safety/public service radio systems...

Sen. McCain: I would also like to offer my support for the allocation of new spectrum for use by public safety and public services organizations and would urge the FCC to adopt rules that would facilitate, if not promote, the development of shared radio systems by such entities.

³⁰ *Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the Year 2010*, First Report and Order, WT Docket No. 96-86, 14 FCC Rcd. 152, 181 ¶54 (1998) (emphasis in original)(hereinafter *First Report and Order*).

³¹ Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services,” PR Docket No. 92-235, *Second Report and Order*, 12 FCC Rcd 14307,14329 at ¶41 (1997).

³² See Comments of UTC at 10.

Such sharing or leasing would be similar to the public safety/private partnership that the Commission tried to establish between the 700 MHz D-Block licensee and public safety – with the added benefit that utilities and CII bring a closer connection with public safety.³³

Leasing or sharing the spectrum with public safety is permissible under Section 337(f) because utility communications meet the “principal” purpose requirement of subsection (A), whether the term “principal” has a quantitative and qualitative meaning. As explained above and in UTC’s comments, utilities and CII operate their own networks and build them to high standards for reliability because these networks ensure the safety and security of their operations, as well as the public that relies on the essential services they provide. Therefore, in a qualitative sense, the principal purpose of these communications services is very much to protect the safety of life, health or property. Moreover, these communications systems are dedicated for private internal voice and data communications that support mission critical operations, as well as other less critical applications. Therefore, in a quantitative sense, the principal purpose of these communications is to protect the safety of life, health or property.

³³ See Comments of Alcatel-Lucent at 26 (citing to the FCC’s *Second Report and Order* and stating “The Commission recognized that secondary commercial use could harness private sector resources to fund the buildout of the interoperable public safety network. Here, CII can play a similar role – with the added benefit that the CII mission significantly advances public safety.”).

CONCLUSION

WHEREFORE, the premises considered, UTC urges the Commission to adopt an inclusive interpretation of Section 337(f) and provide access to 700 MHz public safety broadband spectrum by utilities and other CII. Alternatively, the Commission must allow utilities and CII to be able to lease 700 MHz public safety broadband spectrum. Finally, the Commission should not dictate the terms and conditions for access to the spectrum, including priority access and fees; instead it should let the parties negotiate these terms, and the FCC should review them, if at all, on a case-by-case basis.

Respectfully submitted,

Utilities Telecom Council

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Mike Oldak, General Counsel
Brett Kilbourne, Deputy General Counsel
Utilities Telecom Council
1129 20th Street, NW
Suite 350
Washington, DC 20036
202-872-0030

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